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IN THE

Supreme Court of the United States

October Term, 1941

No. 15

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

v.

DOROTHEA T. FRANK,

Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

ON REHEARING
REPLY BRIEF FOR APPELLANT

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STATUTES

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No. 15

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

v.

DOROTHEA T. FRANK,

Appellee.

On Appeal from the Appellate Term of the Supreme Court of the State of New York

ON REHEARING
REPLY BRIEF FOR APPELLANT

This brief is submitted in reply to those contentions advanced in the substitute brief of the appellee which were not considered in appellant's main brief. It replaces and supersedes appellant's former reply brief, which was directed to appellee's superseded brief. It does not, however, replace or supersede appellant's main brief.

Appellee's contention that appellant's construction of Section 20a will deprive appellee of property without due process of law

The appellee argues (Appellee's brief, pp. 6, 7) that the construction of Section 20a urged by appellant would deprive the appellee of property without due process of law. We submit that this suggestion lacks substance.

In fact it can be affirmatively demonstrated from the record that the appellee and other bondholders are not deprived of any substantial rights or remedies which they at any time had by reason of the guaranty of The Lake Erie & Western Railroad Company. The appellee admits (Appellee's brief, p. 6) that even if appellant's contention be sustained appellee would have a remedy in equity against the assets of The Lake Erie & Western which can be traced into the hands of appellant. *Railroad Company v. Howard*, 7 Wall. 392 (1868). Such a remedy is given in equity on the theory that the appellant took the assets of its constituent companies subject to a trust in favor of their creditors. Under this theory the appellee could reach in equity all the assets of The Lake Erie & Western Railroad Company which the holders of the bonds and coupons could have reached if the consolidation had not occurred.

The appellee has, therefore, substantially all the rights and remedies which she would have had in the New York courts if the consolidation had not occurred. She is, in the case at bar, actually claiming rights (under Section 143) which are additional to those contained in the guaranteed bonds held by her. Such additional rights she can not have, because the State statute under which she claims them is inoperative by reason of its repugnancy to Section 20a.

But for the express provision in Section 143 of the Railroad Law, there would be no basis for a claim that a creditor of one constituent could reach assets derived from another constituent; he could reach assets derived from his debtor and those assets only.

> *Irvine* v. *New York Edison Co.*, 207 N. Y. 425 (1913).

The effect of that provision in Section 143, while it remained in force, was to give the creditors of a constituent concurrent rights to reach the assets derived from that constituent, or to hold the consolidated corporation.

All that Congress did, when by enacting Section 20a it superseded that provision was to take away the special statutory right, leaving the common law right unimpaired.

The mere fact that in the interest of the regulation of interstate commerce Congress has limited appellee to her original contractual rights on the guaranty against The Lake Erie & Western Railroad Company and its assets does not deprive her of property without due process of law.

Cases of the Interstate Commerce Commission relied upon by appellee

In its main brief (pp. 19-23) the appellant has shown that the Interstate Commerce Commission has construed Section 20a as applying to the attachment of obligations in respect of securities to a consolidated corporation upon its consolidation under state law. The appellee does not dispute the holding of the Commission in any of the cases cited by appellant. She argues, however, that two of the cases cited are distinguishable and that in certain others

the Commission has suggested that Section 20a has no application to the attachment of obligations in respect of securities to a consolidated company upon its consolidation pursuant to state law.

The appellee attempts to distinguish the holdings in *New York C. & St. L. R. Co. Assumption of Obligation*, 217 I. C. C. 598 (1936) and *New York C. & St. L. R. R. Co. Bonds and Assumption*, 221 I. C. C. 772 (1937), upon the ground (Appellee's brief, p. 9) that both relate to assumption of liability under agreements extending the maturity dates of mortgage bonds of constituent companies and that they therefore involved not merely the question of the assumption of the old obligation of constituent companies but also the issuance of "new evidences of debt." The fact is, however, that in each the Commission specifically authorized both the proposed extension and "the proposed assumption of obligation and liability as primary obligor in respect thereof, by The New York, Chicago and St. Louis Railroad Company" (221 I. C. C. 772, 774; see also 217 I. C. C. 598, 600).

The appellee also argues (Appellee's brief, pp. 9-10) that it appears from these cases that prior to the applications to the Commission the appellant had paid the interest due upon these bonds and that such payments showed that the appellant deemed it unnecessary to obtain the prior authorization of the Commission to any assumption of such obligations. No such inference can be drawn. Upon consolidation, the properties of the constituent companies had vested in the appellant subject to the liens of their mortgage bonds. Unless interest on such mortgage bonds were paid, the properties of the constituent companies might have

been lost to the appellant by foreclosure of the mortgages. The payment of interest by appellant under these circumstances was made merely to retain the mortgaged properties and did not rest upon the assumption by it of any personal obligation on the mortgage bonds of its constituents.

The appellee also asserts that the Commission by its language in *Assumption of Obligations by L. S. and I. R. R.*, 86 I. C. C. 640 (1924), and in three other cases,[1] indicated that it "deemed the state statutes fully effective in attaching liability irrespective of the application" (Appellee's brief, pp. 7-8).

In *Assumption of Obligations by L. S. and I. R. R., supra*, and other cases cited in our main brief (p. 26) the Commission granted to consolidated companies authority under Section 20a, to assume the obligations of constituent companies which purportedly attached to the consolidated companies by virtue of state statutes. If the Commission had believed the state statutes to be effective to impose such obligations without its approval, it would, under its usual practice, have denied the applications for lack of jurisdiction.

Thus the Commission has several times dismissed applications by carriers for authority to assume obligations in respect of securities on the ground that the action of the carrier did not constitute an assumption of obligations in respect of securities for which the approval of the Commission was required to be obtained under Section

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[1] *Pledge of Toledo, St. Louis & Western Bonds by New York Chicago & St. Louis Railroad*, 86 I. C. C. 465 (1924); *Akron, C. & Y. Ry. Co.* and *Northern Ohio Ry. Co. Reorganization*, 228 I. C. C. 645 (1938); *New York Chicago & St. Louis R. R. Bonds*, 82 I. C. C. 365 (1923).

20a and action by the Commission was therefore unauthorized.

Southern Pacific Company Assumption of Obligation, 189 I. C. C. 212 (1932);
Missouri-K-T R. R. Co. Assumption of Obligation, 212 I. C. C. 217 (1936).

In none of the other cases relied on by appellee was the Commission confronted directly with the problem of the liability of a consolidated corporation upon its constituents' obligations in respect of securities. We respectfully submit that the language relied upon by the appellee does not clearly indicate any opinion of the Commission as to the question presented on this appeal. In any event, as we have shown in our main brief (pp. 19-20), whenever application has been made by a consolidated company for authority to assume its constituents' obligations in respect of securities, the Commission has taken jurisdiction and has granted such authority. In so doing, it has necessarily held that state statutes were not effective to impose such personal obligations in the absence of such authorization.

Appellee's contention that the Interstate Commerce Commission approved the assumption by appellant of the obligations involved in this appeal

The appellee contends (Appellee's brief, pp. 10, 11) that by authorizing the appellant to operate the lines of its constituents and to issue its own capital stock in exchange for the stock of the constituent companies (*Operation of Lines and Issue of Capital Stock by the New York Chicago & St. Louis Railroad Company*, 79 I. C. C. 581

(1923)), the Commission actually approved the assumption by the appellant of all of its constituents obligations in respect of securities.

It is clear from *Operation of Lines and Issue of Capital Stock by the New York Chicago & St. Louis Railroad Company, supra,* however, and from the Commission's order entered therein that the Commission did not consider whether appellant should be authorized to assume the obligations of its constituent companies, nor in fact authorize such assumption. No application was made in that case for any such authorization and it appears from the terms of Section 20a that an authorization of the assumption of obligations must be specifically requested and specifically granted.

The only question before the Commission upon the application of appellant for authority to issue stock under Section 20a was whether such issuance by the consolidated company was compatible with the public interest and necessary and appropriate for, and consistent with, the performance by the appellant of service to the public as a common carrier. It is not the practice of the Commission to consider questions not specifically raised by an application to it, even though such questions may be within its jurisdiction upon proper application.

The only question before the Commission upon the application of the appellant for a certificate under Section 1 (18), (19), authorizing it to acquire and operate the lines of its constituents, was whether public convenience and necessity required such operation. The decisions of the Commission clearly indicate that any assumption of obligations involved in such acquisition or operation must

in addition have the specific authority of the Commission granted under Section 20a upon separate application.

Chicago, Milwaukee & St. Paul Reorganization, 131 I. C. C. 673 (1928) see, especially, pp. 691-2;
Chicago, M. St. P. & P. R. Co. Acquisition, 158 I. C. C. 770 (1930);
Elmira & L. O. R. Co. Acquisition, 170 I. C. C. 127 (1931);
Pacific Coast R. Co. Securities, 189 I. C. C. 79 (1932).

Even where the Commission has approved a consolidation under Section 5 of the Interstate Commerce Act and the issuance or assumption of obligations in respect of securities is incidental to the consummation of the consolidation, separate application under Section 20a must be made by the consolidated carrier for approval of such issuance or assumption.

Grand Trunk W. R. Co. Unification and Securities, 158 I. C. C. 117 (1929);
Rock Island System Consolidation, 193 I. C. C. 395, 403 (1933);
Illinois Term. R. Co. Consolidation and Securities, 221 I. C. C. 676, 690 (1937).

In this respect, the Commission has drawn a sharp distinction between the acquisition of properties and the assumption of liabilities. In its view, authority to consolidate includes authority to acquire and operate the properties of the constituents, but does not include authority to assume their liabilities.

Rock Island System Consolidation, supra, 193 I. C. C. 395, 404 (1933);
Illinois Term. R. Co. Consolidation and Securities, supra, 221 I. C. C. 676, 691 (1937).

It is hard to see how appellee's contention that the situation may have been radically changed by the 1933 amendment to Section 5 (Appellee's brief, Point III) is germane to any issue presently before this Court. Moreover, the appellee's view of the effect of the 1933 amendments is plainly not shared by the Commission, since the cases just cited were both decided under those amendments. (See, especially, *Rock Island System Consolidation, supra*, 193 I. C. C. 395, 396).

It is thus clear that, in the view of the Commission, questions as to the issuance and assumptions of obligations in respect of securities must receive the separate consideration of the Commission upon separate application under Section 20a; and the contention of the appellee that any approval of the Commission can be inferred from its approval of the acquisition of the lines of the constituents and the issuance of capital stock is untenable.

Appellee's contention that "appellant may not assert a defense, based upon its own omission to apply for authority to assume liability"

The appellee finally contends, in substance (Appellee's brief, pp. 12-15), that the appellant is estopped to deny its liability on the guaranty, by its failure to apply, under Section 20a, for authority to assume liability thereon.

Both the express provisions and the purpose of Section 20a exclude any application of the doctrine of estoppel.[2]

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[2] The cases cited by the appellee involve an entirely different question. In two of them (*Marony* v. *Wheeling & L. E. Ry. Co.*, 33 F. (2d) 916; *Cheatham* v. *Wheeling & L. E. Ry. Co.*, 37 F. (2d) 593) the defendant, a carrier, had prior to the enactment of Section 20a, issued preferred stock convertible into common,

Cf. *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245 (1934).

By the express provision of Section 20a (11), any issuance or assumption of obligations in respect of securities, without authorization of the Commission, is void. An obligation, declared void by statute upon broad grounds of public policy, cannot be made valid by estoppel even in favor of a purchaser for value without notice of the invalidity.[3] "A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed." *Texas and Pac. Ry. Co.* v. *Leatherwood*, 250 U. S. 478, 481 (1919).

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thus assuming a valid contractual obligation to issue common stock in exchange for preferred stock duly tendered. For some seven years after Section 20a came into effect, it made no attempt to secure authority to issue the necessary common stock. At the end of that time, the conversion of preferred into common, became advantageous and demands for conversion were made by certain preferred stockholders, whereupon the carrier applied for and eventually obtained authority to issue the necessary common stock. In the meantime, conversion had ceased to be advantageous and the preferred stockholders in question sued to recover damages for the carrier's breach of its contract to exchange on demand. It set up as a defense, impossibility due to supervening illegality. The holdings were, that the impossibility was due to the carrier's failure to apply for authority to issue, and impossibility of performance due to the promisor's own act or default is not a defense to an action for breach of contract.

The third case cited by the appellee (*Murphy* v. *North American Light & Power Co.*, 106 F. (2d) 74) merely holds that where a controlling stockholder undertakes to purchase stock from a corporation, it also impliedly agrees to vote in favor of an increase in stock, if that be necessary to carry out the bargain.

In the case at bar, on the other hand, the appellant never made any promise to the appellee, nor owed her any duty. It is not asserting that it has been relieved from a liability once incurred; it is denying that it ever came under any liability at all.

[3] Section 20a (11) provides a remedy for such a purchaser. That remedy is not a right to recover as if the authorization had been given; it is a right to recover the damages occasioned by such invalidity.

If, by operation of any theory of estoppel, carriers could assume or impose upon themselves obligations in respect of securities merely by failing to apply for Commission authorization, then the carriers and not the Commission would control in such matters. Yet clearly the purpose of Section 20a was to give the Commission plenary and exclusive jurisdiction and control over the issuance and assumption of obligations in respect of securities; and thereby to prevent a possible impairment of the financial ability of carriers to discharge their interstate duties. See: *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 347 (1924).

Respectfully submitted,

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